86-269

Supreme Court, U.S.
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No. 86-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

ALAN J. WHITE,
Petitioner,

vs.

OFFICE OF PERSONNEL MANAGEMENT

and

CONSTANCE HORNER, as Director,
Office of Personnel Management

and

CRAIG B. PETTIBONE, as Assistant
Director for Administrative Law Judges,
Office of Personnel Management
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALAN J. WHITE
8201 Snug Hill Lane
Potomac, MD 20854

Petitioner,
in propria persona

QUESTIONS PRESENTED

1. Whether attorneys seeking eligibility for potential appointment as federal administrative law judges have the same constitutionally protected "liberty" and/or "property" interests as laymen seeking eligibility for potential employment as attorneys.

2. Whether the certification compensation policy of the Office of Personnel Management published in the Federal Personnel Manual provides a basis for a constitutionally protected "property" interest in which eligible or formerly eligible candidates are entitled to an opportunity to establish their entitlement thereunder to be listed at the top of certificates of eligibles.

3a. Whether an agency record fails as a

matter of law to meet the substantive standard of Subsection (e)(5) of the Privacy Act when the agency refuses to answer a request by the subject of the record to correct portions that are believed to be incorrect.

3b. Whether an original hearing equivalent to de novo review is the proper standard for determining an agency's compliance with the substantive standard of Subsection (e)(5) of the Privacy Act when (1) the agency refuses to answer a request by the subject of a record to correct portions that are believed to be incorrect, (2) the agency also refuses to allow the subject of the record and the reviewing courts to see the whole agency record, and (3) the agency's compliance or non-compliance with Subsection (e)(5) becomes moot during the course of the lawsuit with respect to prospective relief, but remains disputed with respect to relief in the form

of money damages.

3c. Whether the subject of an agency record is denied a "day in court" when reviewing courts refuse to decide Question 3a, dismiss the lawsuit in which it is raised on the ground of prematurity, and when the question is raised after maturity, the reviewing courts again refuse to decide Question 3a and conclude that the agency record "did not violate the Privacy Act."

PARTIES IN COURT OF APPEALS

Constance Horner, as Director, Office of Personnel Management, was a party to only one of the consolidated appeals, No. 85-5823.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

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Petitioner	:	
v.	:	
OFFICE OF PERSONNEL MANAGEMENT	:	
and	:	
CONSTANCE HORNER, as Director, Office of Personnel Management	:	No. 86
and	:	
CRAIG B. PETTIBONE, as Assistant Director for Administrative Law Judges, Office of Personnel Management	:	
Respondents	:	

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Alan, J. White, in propria persona, petitions for a writ of certiorari to review the opinion/judgment of the United States Court of Appeals for the District of

Columbia Circuit (Court of Appeals) entered in this proceeding on April 11, 1986, together with the orders of the Court of Appeals entered on May 27, 1986, denying rehearing and rehearing en banc.

OPINIONS BELOW

The opinion/judgment of the Court of Appeals (3a through 15a) is reported at 787 F.2d 660 and ___ U.S.App.D.C. ___. The orders of the Court of Appeals (1a and 2a) and the memorandum opinion and orders of the United States District Court for the District of Columbia (District Court) (16a through 42a) are not reported.

JURISDICTION

The opinion/judgment of the Court of Appeals (3a through 15a) was entered on April 11, 1986, and orders denying a timely petition for rehearing and suggestion for rehearing en banc (1a and 2a) were entered

on May 27, 1986. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Amendment V to the Constitution provides, in pertinent part,

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Pertinent parts of Title 5 of the United States Code, including Section 11 of the Administrative Procedure Act as presently codified, are set forth in the Appendix at 43a and 44a; pertinent parts of Subsections (a), (d), (e) and (g) of the Privacy Act of 1974, 5 U.S.C. § 552a, are set forth at 45a through 49a; and pertinent parts of the original United States Civil Service Commission Regulations Implementing the Privacy Act of 1974, 5 CFR § 297, are set forth at 50a through 59a.

STATEMENT OF THE CASE

The petitioner, Alan J. White (White), is a member of the bar of this Court who, for approximately fifteen years, has authored opinions of the Federal Energy Regulatory Commission (FERC) and its predecessor, the Federal Power Commission.

In January 1975, White filed an application in the Office of Administrative Law Judges (OALJ) of the United States Civil Service Commission (CSC) seeking eligibility for potential appointment as an administrative law judge (ALJ). The OALJ found that he met the requirements of Announcement No. 318 and thereafter developed a numerical examination score under secret benchmarks and procedures. The score was below the passing level of 80 on a scale of 100. The OALJ denied reconsideration and, in May 1976, the CSC Appeals Review Board denied White's request for a hearing and affirmed the ineligible

rating.

In the meanwhile, in January 1976, White filed a second application for eligibility. Under a special secret procedure applicable to repeat candidates, the OALJ obtained from others and used only eight evaluations of White's abilities, compared to eighteen in 1975, and combined all twenty-six evaluations to develop another sub-80 examination score. White appealed to the CSC Appeals Review Board, but the appeal was treated as a request to the OALJ for reconsideration.

On October 22, 1976, while that request was pending, White sent the OALJ a lengthy Privacy Request with substantial documentation asking that five of the evaluations be expunged from the agency record. One was a 1976 evaluation as to which he had been provided a complete copy, and the others were 1975 and 1976 evaluations (two each) as to which he had been provided censored

copies, including redaction of the names of the informants. In order to avoid a "stonewall", and because the Privacy Act had then been in effect only about thirteen months, White concluded the request by calling the OALJ's attention to the specific requirement in 5 U.S.C. § 552a(d) that in the event of a refusal to expunge the evaluations, the OALJ had to inform him of "the reason for the refusal".

Nonetheless, the OALJ "stonewalled" the Privacy Request of October 22, 1976, and did not at any time communicate to White any reasons for refusing to expunge the five evaluations. By letter dated December 2, 1976, (60a), the OALJ denied reconsideration of the ineligible rating, and flaunted the Privacy Act, stating,

> Concerning the three [1/] requests in your October 22 letter, this office

1/ "Three", because the request had been expressed in terms of a single evaluation and two groups of two evaluations.

is unaware of any basis for deleting or expunging particular evaluations from an official record.

On December 7, 1976, White again appealed his ineligibility to the CSC Appeals Review Board.

Since the OALJ had not reviewed the Privacy Request in conformity with the Privacy Act, White, in February 1977, invoked his right under Subsection (g)(1)(A) to file a lawsuit (CA 77-0274) in which the District Court would decide de novo pursuant to Subsection (g)(2)(A) whether the evaluations should be expunged. Instead of doing so, the Court dismissed the lawsuit on the grounds that the agency record wasn't subject to amendment under the Privacy Act and that White's rights thereunder had been honored. White appealed (No. 78-1069), and in April 1978, while the appeal was pending in the Court of Appeals, the CSC Appeals Review Board again denied a request for a hearing and

affirmed the second ineligible rating. In December 1978, the Court of Appeals decided (589 F.2d 713) that the agency record was indeed subject to amendment. But the Court finessed the question of whether the refusal to answer the Privacy Request violated White's rights, by holding that White had sued prematurely, and that he had to challenge the final ineligible rating and the underlying agency record in the same lawsuit. Consequently, the Court affirmed the dismissal stating, "We stress that our holding does not in any way seek to jeopardize rights under the Privacy Act to which appellant may ultimately be entitled. . . ." White petitioned for a writ of certiorari (No. 78-1687), but it was denied in October 1979 (444 U.S. 830). 2/

2/ The Court erred in requiring the combined challenge because Announcement No. 318 permitted ineligible candidates to reapply. The only really important thing was correction of the record because White knew by that time that it would be reused.

In the meanwhile, in January 1978, White obtained from the Department of Justice a copy of the OALJ's Rating Schedule containing the secret benchmarks and procedures, and in March 1980, he filed a third application for eligibility. 3/ Having become aware of the special procedure under which repeat candidates were not rated anew, White was apprehensive that the twenty-six 1975 and 1976 evaluations, which had grown stale, would be combined with a small number of 1980 evaluations to develop a third ineligible score. Accordingly, White submitted a new Privacy Request with the application asking that the agency record developed in 1975 and 1976 be expunged in its entirety, and that the application be treated as his first in developing the numerical score.

3/ By that time, the CSC had been superseded by the Office of Personnel Management (OPM), and the OALJ made the Rating Schedule a public document.

In April 1980, White filed the combined lawsuit (CA 80-0932); the Complaint was substantially identical to the 1977 Complaint except for its enlargement to challenge the second ineligible rating. Because the OALJ had not begun to process the third application and was overdue in responding to the new Privacy Request, White also sought to compel agency action. Thereafter, the OALJ in effect granted the new Privacy Request and agreed to process the third application as if it were White's first.

As a result of the OALJ's actions, the District court in October 1980 dismissed the lawsuit on grounds of laches and mootness. On appeal (No. 81-1017), the Court of Appeals, in March 1982, affirmed the dismissal with respect to prospective relief on the ground of mootness, but the Court reversed the dismissal and remanded the claim for damages under the Privacy Act

because it was timely. On remand, the District Court dismissed the Complaint for the third time in July 1984, ignoring or rejecting all of White's claims as to why the 1975/1976 agency record did not meet the substantive standard of Subsection (e)(5). The Memorandum Opinion ignored the OALJ's refusal to answer the Privacy Request of October 22, 1976, and did not make an original or a de novo review. [4]/ In the meanwhile, in October 1980, the OALJ developed a numerical rating of 89 for GS-16 eligibility (and 94 for GS-15 eligibility), which made White eligible for

4/ Factually, the Memorandum Opinion is materially misleading in what it says and in what it omits to say. The sole purpose of the agency proceeding discussed therein was to force White to breach fiduciary obligations under penalty of losing his job, in vindication of official investigative findings by the Comptroller General of the United States that faulted the particular agency official, who returned one of the five challenged evaluations, for a breakdown in safeguards to prevent conflicts of interest.

potential appointment and placed him in a tie for fourth place on the FERC GS-16 selective register. That was only two points from the top of the register and just "out of reach" from certification as one of the top three eligibles. 5 U.S.C. § 3318(a).

Although White received high ratings, he knew that the OALJ had not complied with a particular procedure in the Rating Schedule; and, after the OALJ denied reconsideration, he appealed to the OPM Administrative Law Judge Rating Appeals Panel (Appeals Panel). In January 1983, the Appeals Panel found that the OALJ had committed an "error" and compelled them to comply with the particular procedure. As a result, White's ratings were raised in September 1983 to 91 and 96, which would have placed him in a tie for first place on the FERC selective register in October 1980, obviously "within reach" for

certification. But, because of changes in the register between October 1980 and September 1983, the additional points again placed him in a tie for fourth place.

The OALJ announced in June 1984 that the examination which had been used at least fifteen years was being changed substantially, that all eligible candidates had to reapply by August 31, 1984, and that the existing registers would be terminated when new ones were established. White reapplied and was informed in January 1985 that he passed the first of four parts of the new examination, but his "unadjusted basic rating score" was too low to enable him to complete the examination in the foreseeable future.

Aggrieved by the fact that it had taken three years to correct his erroneous ratings and that his improved position would be lost only one and one-half years later, White challenged the new examination

in March 1985 (CA 85-0932). Having twice been rated ineligible when the old Rating Schedule was maintained in secrecy, and having received a high (and not marginal) eligible rating when that veil was lifted, he challenged the constitutionality of the secrecy of the new Rating Schedule containing the new benchmarks and procedures.

Shortly after filing the lawsuit, White learned of the OPM's policy promulgated in the Federal Personnel Manual to provide certification compensation in certain situations in which eligible candidates are not certified because of the fault of the OPM. Because of his high position and the OALJ's "error", as determined by the Appeals Panel, White sought discovery to ascertain whether he was entitled to such compensation. But the lawsuit was dismissed on the ground that the District Court didn't have jurisdiction over the subject matter. White appealed (No. 85-5823).

The Court of Appeals consolidated the two appeals. In No. 84-5639, the Court concluded that the challenged 1975/1976 agency record did not violate the Privacy Act (10a), (1) holding that de novo review was not required of the District Court (8a), (2) ignoring the fact that the OALJ hadn't answered the Privacy Request of October 22, 1976, and (3) misconstruing the claim that the special procedure discriminated against repeat candidates. Claiming to have "canvassed the entire range of White's complaints against the government and [having] found them wanting", the Court ignored the fact that the OALJ in 1980 gave White a higher score for his legal experience than in 1976, even though the operative facts were unchanged. (The intervening time was not an operative fact.) In other words, the Court ignored the fact that the OALJ conceded through its rating action in 1980 that the 1975/1976 agency

record had been used erroneously.

In No. 85-5823, the Court held that the District Court erred in dismissing the lawsuit for want of jurisdiction (14a). But with respect to the principal constitutional question common to both appeals, the Court decided without citing any precedent or other authority, and without being asked by the government to do so, that an applicant for a government job doesn't have any constitutional rights (12a). That decision is so outrageous that it must not be allowed to stand!

REASONS FOR GRANTING THE WRIT

1. The "Liberty" and/or "Property" Interests Question

As discussed by Macy [5], hearing examiners (now ALJs) were ordinary employees of agencies before Congress passed the Administrative Procedure Act (APA) in 1946. That was changed by Section 11 wherein (1) the first sentence (now 5 U.S.C. § 3105) (44a) reserved to the agencies employing ALJs the authority to appoint as many as were necessary to carry out the agencies' work, and (2) the last sentence (now 5 U.S.C. § 1305) (43a) removed from the employing agencies and delegated to the CSC the authority to establish and administer standards (benchmarks) for qualifying candidates for potential appointment by the

[5] "The APA and the Hearing Examiner: Products of a Viable Political Society", by John W. Macy, Jr., Chairman of the CSC, 27 Federal Bar Journal 351, 402 (1967).

employing agencies. The separation of the qualification and appointment functions is preserved today in 5 U.S.C. § 1104(a)(2); the ALJ examination is the only civil service examination that may not be delegated by the OPM to other agencies.

In the light of the statutory separation of the qualification and appointment functions, it cannot be over-emphasized that the Court of Appeals mischaracterized the several applications that were filed with and processed by the OALJ. They were not applications for employment. White did not apply to any particular agency for appointment to fill any particular vacancy.[6] The applications sought eligibility for potential appointment to fill any of the approximate 1,100 ALJ positions in twenty-nine departments and agencies as and when

[6] However, in October 1980, upon being notified of his eligibility, White naturally informed the Chief ALJ at FERC of his eligibility and interest in an appointment.

vacancies become available. The OPM stated on brief, in this connection,

> OALJ merely certifies applicants as eligible for appointment. Actual selection and appointment actions are taken by the employing agencies.

If one cannot separate what Congress has joined together, Nantahala Power & Light Co. v. Thornburg, ___ U.S. ____, 90 L.Ed.2d 943, 952 (1986), it follows that the Court of Appeals cannot join together what Congress has deliberately put asunder.

Insofar as the OALJ establishes and administers standards for qualifying candidates for potential appointment, it performs essentially the same function that is performed by state boards of bar examiners -- it controls the entrance to a type of professional employment. In Schware v. Board of Bar Examiners, 353 U.S. 232, 238-239 (1957), this Court formulated the proposition that a state cannot exclude a person from the practice of law or any

other occupation in a manner or for reasons that contravene the due process or equal protection clauses of the Fourteenth Amendment. In Willner v. Committee on Character, 373 U.S. 96 (1963), this Court held that the denial of an adversary hearing to an unsuccessful candidate for admission to the bar was a denial of procedural due process. And in Board of Regents v. Roth, 408 U.S. 564, 574 n. 13 (1972), this Court reaffirmed the principles of those cases and, for the first time, characterized them as invoking a "liberty" interest. It is submitted that Schware and Willner, as reaffirmed in Roth, control this case.

Considering that "property" interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law" (Roth, supra, 408 U.S. at 577) or federal law (Caldwell v. Miller, 790

F.2d 589, 602 (Seventh Cir. 1986)), it is submitted that "property" interests embodied in the Privacy Act of 1974 also control this case. When enacting that statute, Congress found in Section 2(a) (5 U.S.C. § 552a, Historical Note) (emphasis added):

> (1) [T]he privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;
>
> * * *
>
> (3) the opportunities for an individual to secure employment . . . and his right to due process, and other legal protections are endangered by the misuse of certain information systems;
>
> (4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and
>
> (5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

Furthermore, Congress enacted that statute, as stated in Section 2(b), to safeguard

individuals against invasions of personal privacy by requiring agencies to

> (3) [P]ermit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;
>
> (4) collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that . . . the information is current and accurate for its intended use. . .
>
> * * *
>
> (6) be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act.

The express findings and stated purposes require courts to treat the standards and procedures of the Privacy Act as "property" interests that are protected by the Fifth Amendment. As a result, <u>every application for federal employment invokes constitutionally protected "property" interests</u>.

Furthermore, the Court of Appeals was wrong in saying that applications for

federal employment do not invoke constitutionally protected "liberty" interests. This Court invoked such an interest in Wieman v. Updegraff, 344 U.S. 183, 192 (1952), holding that individuals cannot be excluded from public employment by arbitrary loyalty oaths. Accord, Wilson v. City of Los Angeles, 351 P.2d 761, 762-763 (1960). Even the District of Columbia Circuit has said, contrary to its holding herein, that an applicant for public employment "is not without constitutional protection." Scott v. Macy, 349 F.2d 182, 183-184 (1965). Fourteen years ago, in Roth, supra, 408 U.S. at 571 n. 9, this Court said that a 1950 District of Columbia Circuit decision that procedural due process guarantees were inapplicable to public employment "has been thoroughly undermined in the ensuing years." And, only ten years ago, this Court invoked "liberty" interest in voiding a civil

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service requirement that excluded aliens from applying for particular government jobs. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). 7/

The protected "liberty" interest invoked in Schware and Willner, according to Justice Rehnquist (426 U.S. at 121), is "the right to practice one's chosen profession". It is a fair opportunity to realize an individual's identity in a chosen vocation, according to Professor

7/ Justice Rehnquist's dissenting opinion in Mow Sun Wong states (426 U.S. at 120-121, emphasis in original) that Schware and Willner "were both efforts by States, not to deny public employment, but to go further and proscribe the right to practice one's chosen profession in the private sector of the economy." While both cases did involve efforts by states to proscribe the right to practice one's chosen profession, neither case turned on the question of whether that profession would be practiced in the public or private sector. In fact, the question of the sector of ultimate employment wasn't considered or addressed. Successful bar candidates obviously may seek initial employment in either sector and may later change sectors.

Tribe, American Constitutional Law 953 (1978). It is the right not to be arbitrarily denied the opportunity to qualify for government employment, including the right not to be exposed to invidious discrimination, according to Professor Antieau, Modern Constitutional Law 228. It is the freedom "to press to new horizons" according to Justice Douglas in Barsky v. Board of Regents, 347 U.S. 442, 472 (1954). That is the protected "liberty" interest invoked in the employment opportunities cases, such as this case.

In another class of cases -- employment termination cases -- a distinction is sometimes made between situations in which a job is lost under circumstances that do not affect the individual's ability to obtain other employment, such as Cafeteria Workers v. McElroy, 367 U.S. 886 (1961), and those in which the individual's ability to obtain other employment is adversely

affected, such as Greene v. McElroy, 360 U.S. 474 (1960). This is not an employment termination case and, consequently, White's ability or inability to obtain other employment is not relevant to the question of whether he has a right to a hearing before being excluded from the practice of his chosen vocation.

The Court of Appeals, by mischaracterizing the applications as employment applications, and by selecting the "sit idle on the curb" phrase from Barsky rather than the "press to new horizons" phrase, attempted to mold its decision in the form of Cafeteria Workers, which is an employment termination case. The Court accused White of failing to show that the government, when hiring (viz., appointing) ALJs, must comply with the same procedural due process requirements as in licensing all the members of a particular profession. Obviously, White cannot make such a showing

because the states, rather that the government, license the professions. Nor would such a showing be relevant because the OALJ was performing a qualification function, and not an appointment function. Yet, the failure to make such a showing is the sole basis on which the Court of Appeals distinguished Schware and Willner. [8]

In January 1976, White filed his second application for eligibility. At that time, the benchmarks and procedures in the Rating Schedule were closely guarded secrets. White was rated ineligible; he appealed and asked for a hearing, and both were denied in April 1978. His first lawsuit challenging the 1975 agency record as updated in part in 1976 completed its journey through

8/ The Court's accusation admits through the back door that in qualifying candidates for potential appointment, the OALJ in fact licenses all the members of a profession that is practiced solely within the government. Accordingly, in distinguishing Schware and Willner, the Court also admits through the back door that they control this case.

the courts in October 1979, at which time the agency record was almost five years old. If at that time he challenged the second ineligible rating including the denial of a hearing, together with the 1975/1976 agency record underlying the ineligible rating, the ineligible rating should have been overturned for want of a pre-exclusion hearing, and the agency record should have been found to be incomplete for want of the hearing record.[9] He challenged the second ineligible rating and the underlying agency record about six months later, after which the OALJ rated him eligible on his third application and the courts ruled that the challenge of the second ineligible rating was moot. The determination that his request for prospective relief was moot does not change the

9/ The substantive standard of the Privacy Act is set forth in Section (e)(5) and is addressed under "The Privacy Request Questions", infra.

fact that he was entitled under Schware and Willner to a pre-exclusion hearing, and that the agency record was incomplete for want of a hearing record. The argument isn't "ingenious", as the Court said; it's common sense based on the express purposes of the Privacy Act.

Furthermore, the fundamental problem with the reuse of the 1975 evaluations was not their age, as discussed by the Court of Appeals, but the fact that a large number of them were obtained from individuals whom the OALJ treated as important, and thus accorded heavy weight. Because of their reuse as required by the Rating Schedule, the OALJ obtained only a small number in 1976 from individuals who were treated as less important, and combined them with the 1975 evaluations. As a result, repeat candidates, such as White, were placed at a competitive disadvantage to first time candidates because they had to overcome an

ineligible rating with fewer and less weighty evaluations, which was virtually impossible, and first time candidates had to overcome nothing. Considering that the evaluations accounted for zero to forty points, representing 80% of the variable points, the reuse of evaluations of whatever age invidiously discriminated against repeat candidates.

By notice dated June 12, 1986, the OALJ informed White that he was assigned a final eligible rating of 89.86 in the new examination. At White's request, the OALJ also informed him through a computer printout dated June 27, 1986, that his rating placed him in 108th place of those who are available in the Washington and Baltimore areas, which are the geographic areas of his availability. As a result, White is ineligible for practicable purposes for the foreseeable future.

Having invoked his right to agency

appeal, White would like a pre-exclusion hearing but will not receive one because the new Announcement No. 318 states that appeals are decided on the existing record. If he is entitled under Schware and Willner to such a hearing, he is also entitled to access to the secret benchmarks and procedures in the new Rating Schedule. In fact, the secrecy of those benchmarks and procedures is the principal constitutional problem with the new examination because, if a candidate is entitled to their access for the purpose of challenging an ineligible rating, the candidate is also entitled to their access at the time of preparing the application papers. In that way, the candidate can direct the application papers to the specific highest applicable benchmarks, rather than guess his way through them. The current necessity of preparing application papers blindly produces

arbitrary results. 10/

White received a high eligible rating in 1980, in part, because he had obtained a copy of the old Rating Schedule, which enabled him to demonstrate that he should have received additional points in 1975 and 1976, which were received in 1980. And he won his appeal for two additional points because he was able to demonstrate that the OALJ had not followed its procedures.

Denial of this petition will allow the OALJ to operate with Star Chamber secrecy for the indefinite future. If a candidate is not entitled to a pre-exclusion hearing, including access to the agency record and the secret Rating Schedule, no one will ever be able to ascertain whether the benchmarks are applied properly and the procedures are followed. No one will ever

10/ A fortiori, the new benchmarks were developed after the initial group of application papers had been filed, and from some of them.

be able to challenge benchmarks as being arbitrary, as was done successfully in Etelson v. Office of Personnel Management, 684 F.2d 918 (D.C. Cir. 1982). [11]/ In fact, as discussed in Barnhart v. Devine, 771 F.2d 1515, 1520-1521 (D.C. Cir. 1985), the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB) will be severely handicapped, if not disabled, in performing their respective jobs under the Civil Service Reform Act of 1978 of investigating and protecting the observance of merit system principles, insofar as those principles concern the ALJ examination. See, for example, 5 U.S.C. § 1206(A)(1), requiring the OSC to investigate allegations of prohibited personnel practices, and 5 U.S.C. § 1205(a)(4), requiring the MSPB to review rules and

11/ Etelson was given access to the entire agency record when he filed his lawsuit; White, on the other hand, has never seen the entire record.

regulations of the OPM, including the procedural rules in the new Rating Schedule.

Those principles are codified at 5 U.S.C. § 2301(b) and state, insofar as they pertain to applicants for employment:

> (1) Recruitment should be . . . after fair and open competition which assures that all receive equal opportunity.
>
> (2) All . . . applicants for employment should receive fair and equitable treatment . . . with proper regard for their privacy and constitutional rights.

Congress not only said, contrary to the Court of Appeals, that applicants have constitutional rights, but that they should be protected against infringements of those rights! Senate Report No. 95-969, 95th Congress, 2d Session, at 19.

If ALJs are functionally comparable to Article III judges, as this Court said in Butz v. Economou, 438 U.S. 478, 513 (1978), and if it is so important to preserve their independent judgment that they are entitled

to absolute immunity from damages liability for their judicial acts, Id. at 514, it is submitted that candidates for ALJ positions are entitled to the same process that is accorded by the Senate to nominees for Article III positions. As in the case of the justices of this Court, there may be opponents as to whom notions of fairness demand an opportunity to respond.

2. The Certification Compensation Question

The OALJ was directed by the old Rating Schedule to send evaluation forms to "the references listed by him [the candidate] on page 3 of his SF-171." Item 26 on page 3 of Standard Form 171, known as the "Personal Qualifications Statement", required every candidate to list as personal references three individuals who are not related to him or her and "who have definite knowledge of your qualifications

and fitness for the position for which you are applying."

In 1980, the OALJ did not send evaluation forms to White's three personal references, and White complained to the Appeals Panel (emphasis in original):

> The Rating Schedule requires without exception that evaluations be solicited from applicants' Form 171 references. The OALJ did not comply with the Rating Schedule in that respect. It must be expected that such references will be favorable witnesses; otherwise, the individuals would not have been named as references. And I am disadvantaged insofar as my final ratings are in competition with the final ratings of others whose Form 171 references received and returned evaluation inquiries.

The Appeals Panel ruled in White's favor and concluded that the OALJ made an "error" by not sending the forms to the references; and it compelled the OALJ, against the OALJ's objections, to send out the forms. As indicated earlier, the OALJ in September 1983 raised White's rating score to 91, which would have placed him in a tie for

first place in October 1980, but which placed him in a tie for fourth place in September 1983. Although the OALJ raised White's scores, it did not compensate him for any certification opportunities that might have been lost as a result of the erroneous scores, nor did it even inform him of the OPM's certification compensation policy.

White learned of that policy several days after he filed the lawsuit to challenge the new examination. It is promulgated in Chapter 332 of the Federal Personnel Manual, Subchapter 4-3.a.(2):

> Coverage. The following eligibles are considered to have lost opportunities for certification:
> --Eligibles whose names, though they were within reach or would have been within reach, were not included on one or more certificates through fault of OPM.
> --Eligibles who, though certified, are found by OPM not to have received bona fide consideration for appointment.
>
> Policy. Eligibles who lost opportunity for certification are placed at the head of the register until they receive the

> opportunity they lost. If the register on which the eligible's name appears is terminated before he/she receives the opportunity lost, his/her name is entered at the top of the successor register, even though the requirements are different, until he/she receives the opportunity lost.

Since White would have been tied for first place in October 1980 but for the OALJ's "error", as determined by the Appeals Panel, and since all information concerning certificates and registers was in the sole possession of the OALJ, he filed requests for discovery pursuant to FRCP 56(f) specifically to determine whether he was entitled to certification compensation and, if so, the measure of the compensation. However, the lawsuit was dismissed before he received that information, and the Court of Appeals concluded that the dismissal was erroneous, stating, "No protected property interest can be shown to exist here."

This aspect of the petition is controlled by Perry v. Sindermann, 408 U.S. 593, 601

(1972), wherein this Court said:

> "[P]roperty" denotes a broad range of interests that are secured by "existing rules or understandings." . . . A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

It is submitted that White has a protected "property" interest in the OPM's policy. Furthermore, even though White has not yet shown that he is eligible for compensation under that policy, he has a right to a hearing at which he might attempt to do so. Sindermann, supra, 408 U.S. at 603; Goldberg v. Kelly, 397 U.S. 254 (1970); Roth, supra, 408 U.S. at 577. "A plaintiff's inability to obtain evidence under control of the defendants does not justify summary judgment." Jackson v. Procunier, 789 F.2d 307, 312 (Fifth Cir. 1986).

If White is eligible for certification compensation, it is mandatory under the

OPM's policy to list him at the top of a minimum of one certificate. Only two weeks after the District of Columbia Circuit ruled that White didn't have a protected "property" interest, the Ninth Circuit ruled that mandatory "bumping" rights conferred a protected "property" interest, and that a public employer committed a due process violation by failing to inform an individual of his right to bump into specific positions. Alexander v. City of Menlo Park, 787 F.2d 1371 (Ninth Cir. 1986). Particularly because the OPM never informed White of his potential right to certification compensation, it is submitted that the two circuits are in conflict with one another with respect to whether published policies of public employers give rise to protected "property" interests.

3. The Privacy Request Questions

It is incredible that the Court of Appeals held that the 1975/1976 agency record "did not violate the Privacy Act" considering (1) that Subsection (d)(2)(B) expressly required an answer to the Privacy Request of October 22, 1976, and (2) the "whole record" compiled by the OALJ -- the basis for review required by 5 U.S.C. § 706 -- was not before either of the courts below. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419 (1971). In fact, the court record establishes that the government doesn't even know what documents comprised the "whole record", and the District Court conceded that the "reasons for the other unfavorable recommendations are unknown"(35a). 12/

12/ The holding is particularly incredible because the refusal to answer the Privacy Request was "without observance of procedure required by law" (5 U.S.C. § 706(2)(D)), "not in accordance with law" (§706(2)(A)), and "contrary to constitutional right" (§706(2)(B)) conferred by the Privacy Act.

The substantive standard of the Privacy Act is contained in Subsection (e)(5) which requires agencies (emphasis added) to

> maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination. . . .

The standard includes a perspective of "fairness to the individual", as distinguished from fairness in the abstract. Furthermore, the word "maintain" is defined in Subsection (a)(3) to include "maintain, collect, use, or disseminate". Consequently, agency records must be collected (compiled), for example, and used, in accordance with the substantive standard.

The subject of an agency record may request the agency pursuant to Subsection (d)(2) to correct any portion of the record which the individual believes is not accurate, relevant, timely or complete.

The Privacy Act and the CSC's implementing regulations spelled out a four-step procedure, as follows:

First, the subject of the record was required to submit a specific request for changes, including a "statement of the basis for the requested correction or amendment, with all available supporting documents and materials which substantiate the statement." 5 CFR § 297.111(e).

Second, the agency was required to acknowledge receipt of the request and either make the corrections, or inform the individual of its refusal to do so, the reasons for the refusal, and the procedures for agency review. Subsection (d)(2) and 5 CFR § 297.112(a).

Third, the subject of the record could submit a request for review which was required to include "a statement of the reasons why the initial denial [refusal] is believed to be in error." Subsection

(d)(3) and 5 CFR §§ 297.113(a) and (c).

Fourth, the agency was required to make a final determination; and, if the agency still refused to change the record, it was required to permit the subject of the record to file a concise disagreement statement, and to notify the individual of the provisions for judicial review. Subsection (d)(3) and 5 CFR §§ 297.113(d), (e) and (f).

White had a protected "property" interest in the foregoing procedures insofar as they are spelled out in Subsections (d)(2) and (3), including the right to an answer that conformed to those provisions. Roth, supra, 408 U.S. at 577. Furthermore, the CSC was required by United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954), among other cases, to comply with those procedures at the expense of having

its refusal to do so set aside. [13]/

Although the Privacy Request of October 22, 1976, complied with the first step, the OALJ did not inform White of any substantive "reasons for the refusal" as was required by the second step and, consequently, the statutory/regulatory procedure broke down. As a result, the agency record contained evaluations that should have been expunged if the request had been granted, in which case it contained irrelevant materials, or, alternatively, it failed to contain a disagreement statement if the request had been denied, in which case it was incomplete. Such a record, as a matter of law, was not collected (compiled) in accordance with the substantive standard and was not used in accordance with that standard in developing a numerical rating

13/ In this instance, the proper relief would have been to expunge the five evaluations whether or not there was substantive merit to White's claims.

score.

Furthermore, when an agency determines not to amend a record in accordance with a Privacy Request or fails to comply with the Subsection (d)(3) procedure, the subject of the record may file a lawsuit pursuant to Subsections (g)(1)(A) and (g)(2)(A) for the purpose of correcting the record, and the court is directed by the latter provision to determine the matter de novo. White filed such a lawsuit in 1977 (CA 77-0274) and in 1980 (CA 80-0932), but has yet to receive do novo review. Contrary to the Court of Appeals herein, he was entitled in the District Court to an original rather than an appellate hearing. Black's Law Dictionary, 392, 649 (5th ed. 1979).

It is inconceivable that Congress provided two standards of judicial review, de novo in the case of correcting records, and appellate in the case of claiming damages resulting from incorrect records.

Subsection (g)(2)(A) is the only provision that directs HOW an agency's compliance with Subsection (e)(5) shall be determined, and it says that "the court shall determine the matter de novo." Subsection (g)(1)(C) authorizes the filing of a lawsuit when an agency fails to comply with Subsection (e)(5) and an adverse determination is made, but it does not prescribe how the jurisdictional failure to comply is to be determined. That is not necessary because the failure to comply with Subsection (e)(5) runs to the jurisdiction of the District Court in a lawsuit under Subsection (g)(1)(C) and, consequently, is for the Court alone to decide in an original hearing (and not as a matter of review of the agency's position), which is substantively the same as de novo review. In such a case, the District Court must give the subject of the record an opportunity for discovery and for a hearing that is

appropriate to the nature of the contrary claims. Williamson v. Tucker, 645 F.2d 404, 414 (Fifth Cir. 1981), cert. den. 454 U.S. 897 (1981).

Since every claim for money damages includes a claim that the agency did not comply with Subsection (e)(5), and particularly since claims to correct erroneous records and claims for money damages resulting from erroneous records are not mutually exclusive, an agency's compliance or non-compliance with Subsection (e)(5) must be determined in the same manner for both types of claims. Even the government said on brief that the Privacy Act provides a right of de novo review that is relevant to the issue of causation, apparently referring to the causation of damages. The government was right substantively but wrong technically; it is not a right to de novo review of the agency's determination, but a right to an original hearing on a

complex mixed question of fact and law that runs to the court's jurisdiction to award money damages.

Furthermore, an agency's action on a request to change a record that is believed by the subject of the record to be inaccurate, is adjudicatory in nature. When the agency refuses to answer such a request, and particularly when it withholds the names of informants, the agency factfinding procedures are clearly inadequate. Consequently, assuming arguendo (contrary to White's position) that the compliance/non-compliance determination is a matter of court review as distinguished from an original court determination, de novo review was required herein pursuant to 5 U.S.C. § 706(2)(F). Overton Park, supra, 401 U.S. at 415.

The government has argued that the OALJ's denial of reconsideration dated December 2, 1976 (60a through 63a) of the ineligible

rating, in fact answered the Privacy Request because the OALJ said therein

> [T]his office has. . .assigned minimal weight to the checkmarks contained in the Form 192 dated June 1, 1976, which you challenge.

In other words, the OALJ reasoned that it wouldn't expunge the one complete evaluation that had been challenged because it had done the next best thing by according it "minimal weight". [14]/ That letter did not answer the Privacy Request because it did not expressly act on the request and it did not comply with Subsection (d)(2)(B)(ii) as was done routinely in the case of denials. [15]/ More important, the claim that the OALJ assigned "minimal weight" to the evaluation is refuted by the court record

[14]/ Publicly, the OALJ thereby informed White that his request to expunge the particular evaluation was granted, for practicable purposes.

[15]/ Furthermore, the OALJ's letter of December 2, 1976, did not mention any of the other four evaluations and, consequently, gave no reasons for refusing to expunge them.

which establishes indisputably that the OALJ assigned the greatest of all weights to that evaluation, in direct violation of the old Rating Schedule. In other words, the OALJ lied, and White was able to prove that lie only because the government somehow allowed him to copy documents that he wasn't supposed to see. The OALJ's lie provides the "intentional or willful" conduct for awarding money damages pursuant to Subsection (g)(4). It also gives this Court the best of reasons for granting this petition for considering the question of secrecy in the new ALJ examination.

In 1978, the OALJ's refusal to answer the Privacy Request of October 22, 1976, to expunge the five evaluations, was squarely before the Court of Appeals; but the Court avoided a decision on the legal effect of the refusal by holding that the lawsuit was premature, which disposition hadn't been urged by the government. The Court

stressed that "our holding does not in any way seek to jeopardize rights under the Privacy Act to which appellant may ultimately be entitled. . . ."

Nine appeals and eight years later the Court rebuked White because "the evaluations remain the core of the dispute" and "this interlocking series of cases has gone on far too long." As a result, the Court in 1986 continued to avoid a decision on the legal effect of the refusal that was before it in 1978, holding that White doesn't have any constitutional rights and that he is not entitled to an original determination (as he was in 1978) on the agency record's compliance or non-compliance with Subsection (e)(5). Again, the particular disposition had not been urged by the government.

It is respectfully submitted that White was pursuing legal rights that had been denied erroneously and, consequently, that

the Court of Appeals' criticism was entirely unjustified. It is also submitted that he has been denied a "day in court" for the past eight years, and will be denied that day entirely if this petition is denied.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the opinion/judgment and the orders of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

ALAN J. WHITE
8201 Snug Hill Lane
Potomac, MD 20854
Petitioner, in propria persona

APPENDIX

[Filed May 27, 1986]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 84-5639 September Term, 1985

Alan J. White CA No. 80-00932

v.

Office of Personnel Management,
et al.
And Consolidated Case 85-5823

BEFORE: Mikva and Bork, Circuit Judges;
Swygert*, Senior Circuit Judge,
U.S. Court of Appeals for the
Seventh Circuit

O R D E R

Upon consideration of appellant's petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to 28 U.S.C. 294(d).

[Filed May 27, 1986]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5639 September Term, 1985
Alan J. White CA No. 80-00932

v.

Office of Personnel Management, et al.
And Consolidated Case 85-5823

BEFORE: Robinson, Chief Judge; Wright, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia, Starr, Silberman and Buckley, Circuit Judges; Swygert*, Senior Circuit Judge, U.S. Court of Appeals for the Seventh Circuit

O R D E R

The suggestion for rehearing en banc of appellant Alan J. White, has been circulated to the full Court and no member has requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to 28 U.S.C. 294(d).

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5639

ALAN J. WHITE, APPELLANT

v.

OFFICE OF PERSONNEL MANAGEMENT, et al.

No. 85-5823

ALAN J. WHITE, APPELLANT

v.

OFFICE OF PERSONNEL MANAGEMENT, et al.

Appeals from the United States District Court
for the District of Columbia
(Civil Action Nos. 80-00932 and 85-00932)

Argued December 18, 1985

Decided April 11, 1986

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Alan J. White, Pro Se, in Nos. 84-5639 and 85-5823.

Scott T. Kragie, Assistant United States Attorney, with whom *Joseph E. diGenova,* United States Attorney, *Royce C. Lamberth* and *R. Craig Lawrence,* Assistant United States Attorneys were on the brief for appellees in Nos. 84-5639 and 85-5823.

Before: MIKVA and BORK, *Circuit Judges,* and SWYGERT*, *Senior Circuit Judge.*

Opinion for the Court filed by *Circuit Judge* MIKVA.

MIKVA, *Circuit Judge*: These consolidated cases represent but the latest chapter in Alan White's protracted struggle with the Office of Personnel Management (OPM). OPM oversees the selection of administrative law judges employed by the federal government. White has been trying to become an administrative law judge since January 1975. After two unsuccessful applications, White turned to the judicial process in February 1977. Since that time this court has ruled nine times in the matter of White versus the Office of Personnel Management, on more than one occasion disposing of consolidated appeals. White's suits have alleged violations of, *inter alia,* the Constitution, the Privacy Act, the Freedom of Information Act, the Administrative Procedure Act, and various regulations implementing these Acts. In the two cases at bar, White is suing for damages under the Privacy Act and for relief for alleged violations of his fifth amendment rights. Because we find that White is not entitled to damages under the Privacy Act and that his constitutional claims are entirely lacking in merit, we affirm the decisions of the district court.

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* Of the United States Court of Appeals for the Seventh Circuit, sitting by designation pursuant to 28 U.S.C. § 294(d) (1982).

I. *No. 84-5639*

In White's first effort to litigate his non-selection as an administrative law judge, *White v. United States Civil Service Commission*, 589 F.2d 713 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 919 (1979), this court stated that

> At the core of this dispute are certain evaluations of appellant Alan J. White that were solicited [from his colleagues and superiors] by the United States Civil Service Commission [(OPM is the successor to the Commission)] in connection with appellant's application for the position of administrative law judge. . . . Appellant was apparently worried that, because he had experienced some employment difficulties . . . , the evaluations might have mischaracterized the manner in which he had discharged his duties. He sought, therefore, to have these potentially damaging evaluations removed from his application records on file with the Civil Service Commission by pressing a claim under the Privacy Act of 1974. [5 U.S.C. § 552a.]

Id. at 714.

After eight years, the evaluations remain the core of the dispute in No. 84-5639, the first of the two consolidated cases we decide today. In his original suit, White alleged that retention of the disputed evaluations violated the Privacy Act's requirement that government records be accurate. See 5 U.S.C. § 552a(e)(5) & (g)(3) ("Each agency that maintains a system of records shall . . . maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness and completeness as is reasonably necessary to asure fairness in the determination."). White believed that if the records were amended he could yet succeed in his failed applications for an administrative law judge position. Therefore, White sued under the Act to have his records amended and his application reconsidered. *See* 5 U.S.C. § 552a(g).

The district court found against White. *White v. United States Civil Service Commission*, Civ. Act. No. 77-0274 (D.D.C. Dec. 7, 1977). We affirmed in part in the opinion quoted above.

In that opinion, this court decided that White's Privacy Act claim was premature. We affirmed the dismissal of the suit because White had not exhausted his available remedies under the Administrative Procedure Act. We held that "an assessment of Privacy Act claims is properly undertaken simultaneously with the District Court's review of the administrative action," *White*, 589 F.2d at 715 n.4, and that Privacy Act litigation should not be allowed to circumvent the procedures established by the Administrative Procedure Act for correcting agency errors. Otherwise, the Congressional scheme devised for individuals "distressed by agency treatment of their employment applications" would be undermined. *Id.* at 714.

After something of a hiatus, White filed the lineal predecessor of No. 84-5639 in April of 1980. In his complaint, White sought damages under the Privacy Act with respect to the OPM's treatment of his first two administrative law judge applications. *See* 5 U.S.C. § 552a(g). White also sought prospective relief with respect to a third application he had submitted in March 1980. White wanted the OPM to review his new application without considering the disputed evaluations that had been the subject of the earlier litigation. The district court again ruled against White. *White v. Office of Personnel Management*, Civ. Act. No. 80-0932 (D.D.C. Oct. 16, 1980). On appeal from that decision (in an unpublished opinion) this court upheld the dismissal of White's claim for prospective relief. *White v. Office of Personnel Management*, No. 81-1017 (D.C. Cir. Mar. 30, 1982). The claim was moot because OPM had agreed to consider White's 1980 application without the offending evaluations. However, the court remanded the cause to the dis-

trict court for a determination of White's retrospective claim for damages. On remand, the district court decided that no violation of the Privacy Act had occurred. *See White v. Office of Personnel Management*, Civ. Act. No. 80-0932, slip op. (D.D.C. July 13, 1984). The current appeal in No. 84-5639 is from that decision.

The district court concluded that when OPM retained the disputed evaluations it had not violated the Privacy Act's requirement of accuracy. 5 U.S.C. § 552a(e)(5). The court held that the challenged evaluations necessarily contained opinions and subjective judgments and that, to satisfy the statutory command, the agency was not required to assure that all of these opinions and judgments were accurate. The court, however, did not absolve the agency of all responsibility for vetting the evaluations. It held that if a negative or damaging response were based on a demonstrably false premise, the agency would not be permitted to retain the evaluation. Where a subjective evaluation is based on a multitude of factors, however, and there are various ways of characterizing some of the underlying events, the court held that it is proper to retain and rely on it. We agree. The district court's reasoning is correct and in accord with governing precedent. *See* ~~*Doe v. United States*, 791 F.2d 907 (D.C. Cir. 1986),~~ *R.R. v. Department of the Army*, 482 F. Supp. 770 (D.D.C. 1980).

White argues on appeal that the district court failed to determine the matter *de novo* and that if it had, it would have found in his favor. White is wrong, however, to assert that *de novo* review is required. Section 552a(g)(2)(A) of the Privacy Act calls for *de novo* review in § 552a(g)(1)(A) suits for *amendment* of records. In such a suit, the district court is not to assess the agency's review of the amendment request, but rather is to determine for itself whether the request should have been granted. In § 552a(g)(1)(C) and (g)(4) suits for damages, however, *de novo* review is not called

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for. Rather, the reviewing court is to inquire whether the standard articulated in § 552a(g)(1)(C) has been met. This inquiry is necessarily distinct from any undertaken by the agency—no damage claim can be brought directly against the agency—but it is not *de novo* review. The district court here properly inquired whether the records in question satisfied the appropriate test.

In the district court, White also challenged the agency's use of evaluations solicited at the time of his first application in 1975, to evaluate his second (1976) application. White asserted that this violated the Privacy Act's requirement of timeliness, § 552a(e)(5) & (g)(1)(C), and led to a claim for damages against the government. The district court, however, held that the Act's requirement of timeliness was not violated. The district court reasoned that because the evaluations themselves contained information about the time period they covered, and because the OPM weighs the evaluations by recency, their use was in accord with the requirements of the Privacy Act. We agree. If records become too old, the Privacy Act *will* bar their use, but, for the reasons laid out by the district court, we do not find that the year-old evaluations here fall into that category. The Privacy Act does not require that agency records contain only information that is "hot off the presses." To hold that the Privacy Act bars the use of year-old evaluations, properly identified as such, would be an unwarranted intrusion on the agency's freedom to shape employment application procedures. As long as the nature and age of the information in the records is apparent, and the information is not so stale as to impede fairness, retaining information of various vintages is not precluded by the Act. We emphasize, however, that the determination whether records are in fact timely enough to assure fairness is inherently factual; our decision today is necessarily fact-bound.

White also argues that, under the due process clause of the fifth amendment, he was entitled to a hearing before either of his first two applications could be denied. White ingeniously turns this into a Privacy Act claim by asserting that the lack of a hearing, and the resultant lack of a record of such a hearing, renders the administrative record incomplete. He concludes that the OPM's records violated the Privacy Act's requirement of completeness and that he is entitled to damages. He is wrong for two reasons.

First, the fifth amendment cases relied on by White simply do not support his assertion that he was entitled to a hearing. *See, e.g., Board of Regents v. Roth*, 408 U.S. 564 (1972); *Willner v. Committee on Character*, 373 U.S. 96 (1963); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117 (1926). The right to a hearing does not attach every time the government denies an employment application. Rather, before the right to a hearing attaches, a deprivation greater than the denial of a particular job application must be involved. Professor Tribe has characterized the Court's decisions in this area as reflecting a "revitalized concern to prevent at least procedurally unfair exclusions from the occupation or vocation of one's choice." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 950 (1978). Nowhere in the Supreme Court's teachings on the subject do we find anything to suggest that denying a particular application for government employment constitutes such an exclusion. We conclude that White has failed to demonstrate that denying his application to become an administrative law judge constitutes a deprivation of a constitutionally protected liberty or property interest. *See also infra*, part II.

The situation might be different if the United States had excluded White from all government employment. Here, however, the United States has not "condemn[ed]

a man to a suspect class and the outer darkness, without the rudiments of a fair trial." *Peters v. Hobby*, 349 U.S. 331, 351 (1955) (Douglas, J., concurring) (Civil Service Commission's Loyalty Review Board had barred Peters from all federal employment). Rather, the government merely found that a particular application for a particular job was unsuccessful.

Second, and more importantly, if White wishes to press a fifth amendment claim he should do so directly. Virtually everything the government does involves paperwork. Each time the government violates the Constitution, statutes or regulations, its paperwork could therefore be said to be "inaccurate" or "incomplete." Not every such violation, however, gives rise to a Privacy Act claim. To hold otherwise would transform every constitutional and statutory claim based on administrative action into a Privacy Act suit. *Cf. White v. United States Civil Service Commission*, 589 F.2d 713 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 919 (1979).

We do not find any of White's attacks on the district court judgment in No. 84-5639 compelling. We think the district court correctly decided that the challenged records did not violate the Privacy Act. Absent such a finding, damages are not in order.

II. *No. 85-5823*

White also has had poor luck with his third (1980) application to become an administrative law judge. After that application was evaluated, White received a rating that rendered him eligible for listing on a register for selection as an administrative law judge by a particular federal agency. The rating was not high enough, however, that it resulted in his selection. White administratively appealed his rating. It was corrected and his name advanced on the register. But, although White was first rated in October of 1980, his appeal was not re-

solved until September 1983. After his appeal, White was listed in fifth place on the selection register; by August 1984, he had moved up to first place. In June 1984, however, OPM announced the abolition of the register and instituted a new application procedure. White's long climb to the top was thus nullified. White reapplied under the new procedures but so far has been unsuccessful in his quest to become an administrative law judge.

In March of 1985, White sued the OPM under the Administrative Procedure Act, the Declaratory Judgment Act and the Constitution, asking that the district court order OPM to grant him the benefit of his position on the abolished register. On May 29, 1985, the court dismissed the complaint for lack of jurisdiction. The court held that White's claims under the Administrative Procedure Act were unreviewable in light of the Civil Service Reform Act, and that his constitutional claims were not clearly enough articulated to sustain subject matter jurisdiction. In No. 85-5823, White appeals that dismissal.

The substance of White's argument seems to be that his initial qualification for the administrative law judge position (i.e., his listing on the register) is a liberty interest protected by the due process clause of the fifth amendment. This claim is not supported by precedent. White compares his case to cases where the Supreme Court has held that bar examiners and other governmental and governmentally-sanctioned regulatory bodies are required to accord procedural due process to applicants for licensing or certification. *See, e.g., Willner v. Committee on Character*, 373 U.S. 96 (1963) (Willner was deprived of due process when he was denied admission to the bar without a hearing); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957) (evidence relied upon in denying Schware the opportunity to qualify as a lawyer was insufficient and the denial deprived Schware of due process). These decisions are founded on the Court's

recognition of the individual's liberty interest in being free to practice his or her chosen profession. *See* L. TRIBE, *supra*. The Constitution requires that before an individual can be barred entirely from a vocation or a certain class of employment he must be afforded an opportunity to be heard. White argues that, because he had a protected liberty interest in his right to practice the profession of administrative law judge, the OPM was similarly required to afford him a hearing before it could abolish the selection register and institute a new application process. White's claim is without merit.

The premise of White's argument—that his placement on the selection register involves an initial qualification for a type of professional employment—is incorrect. White's placement on the register was part of the government's hiring process for a particular job. The government's relationship with an applicant for a particular job does not implicate the due process clause's protection of liberty interests.

Justice Douglas eloquently summarized the values and ideals the Court has protected by application of the due process clause:

> The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on *Politics*, "A man has a right to be employed, to be trusted, to be loved, to be revered." It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the faces of nature, to match skills with his fellow man.

Barsky v. Board of Regents, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting). We see no danger that be-

cause White has thus far failed in his quest to become an administrative law judge that the state has interfered with the precious liberty that is his right to work. Simply denying White a particular government job does not mean the state has forced him "to sit idle on the curb." White fails to show that because the government is the only employer of administrative law judges it must comply with the same procedural due process requirements when hiring them as in licensing all the members of a particular profession. Thus, cases like *Schware* and *Willner* that deal with state regulation of eligibility for a particular type of professional employment are inapposite. We decline to find a constitutionally protected liberty interest in the freedom to pursue the profession of administrative law judge in the employ of the United States. We think that the concerns with the state's control over an individual's liberty that led to the decisions in the licensing cases are absent when the individual is simply seeking a particular government job.

Nor has White been debarred from all employment with the government—a circumstance that in our day might involve his constitutionally protected liberty interests. Thus, we should not be understood as in any way denigrating the importance of the government as employer. *See Peters v. Hobby, supra.* Nor are we denying the importance of the due process clause in regulating such an employment relationship once it is established. We simply do not believe that lawyers who wish to become administrative law judges with the United States possess a liberty interest in the mere pursuit of that employment.

In his reply brief and at oral argument, White changed his strategy somewhat and asserted that he had been deprived of a protected property interest. He argues that his spot on the selection register constituted such an interest. We find no more merit in this contention than we do in his liberty interest argument. The Supreme

Court has spoken clearly on the circumstances necessary to find a constitutionally protected property interest. *See, e.g., Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487, 1491-93 (1985); *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972) ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . . Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from a[] . . . source such as state law—rules or understandings that support claims of entitlement to those benefits."). No protected property interest can be shown to exist here. We decline to find the government constrained to afford White a hearing before it may change its employment application procedures. While we can sympathize with White's frustration at having his position on the selection register abolished, we do not think the government is constrained to fulfill White's hope of selection.

Despite the lack of merit in White's constitutional claims, the district court was wrong to dismiss them for lack of *jurisdiction*. The district court relied on *Carducci v. Regan*, 714 F.2d 171 (D.C. Cir. 1983). In that case, which involved a dismissal for failure to state a claim on which relief can be granted (Fed. R. Civ. P. 12(b)(6)), this court declined to address and resolve a constitutional issue because of grossly inadequate briefing by the parties on appeal. *See Carducci* at 177. Subsequently, in *Gray v. Office of Personnel Management*, 771 F.2d 1504 (D.C. Cir. 1985), this court referred in *dicta* to the *Carducci* court's refusal to address a "bare-bones" assertion of constitutional violation. The opinion could be read as aproving the action of a district court that declines to address a claim advanced only perfunctorily. However, the district court in *Gray* had dismissed

the constitutional claim on the merits. And the court of appeals rested its holding on a finding that the constitutional challenge was *moot*. *See id.* at 1513. Neither *Carducci* nor *Gray* said anything about jurisdiction. Rather, both involve the showing necessary to prevail on or continue to litigate a constitutional claim.

Thus the OPM's argument that White's "cavalier" attitude towards his constitutional claim, and his mere "peppering" of his complaint with references to the fifth amendment bring this case within *Carducci's* ambit is incorrect. The district court does not lack subject matter jurisdiction because a complaint does not fully set out the supporting precedent and legal theory behind a constitutional cause of action. The situation here is far removed from that of *Carducci*. In *Carducci* the court declined to decide an issue that was not briefed on appeal. The holding was merely an application of the well-settled principle that only those issues appealed will be considered by the court. (Except, of course, when the court's authority or power to resolve the dispute is called into question.)

However, because we find White's alleged constitutional claim to be so totally devoid of merit, and because the issue is purely a legal one, we see no need to remand this case to the district court. Although dismissal was on the wrong grounds, we affirm.

Conclusion

We are certain that this interlocking series of cases has gone on far too long. Having today canvassed the entire range of White's complaints against the government and found them wanting, we hope that this litigation can finally come to an end.

Affirmed.

[Filed May 30, 1985]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN J. WHITE,	:	
Plaintiff	:	
v.	:	CIVIL ACTION NO. 85-0932
OFFICE OF PERSONNEL MANAGEMENT,	:	
Defendant	:	

ORDER

Plaintiff has filed a complaint for injunctive and declaratory relief, alleging violations of statutory duties and constitutional rights by the Office of Administrative Law Judges (OALJ). Specifically, plaintiff challenges the system of selection of Administrative Law Judges, a position for which he is an active candidate. Plaintiff's complaint is based on a recent announcement by the OALJ that it would revise the examination and priority lists for the Administrative Law Judge positions.

The Court concludes, however, that it is without jurisdiction to entertain this matter. Agency personnel action previously reviewable under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., does not continue to be reviewable by a district court after the enactment of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C. (Supp. V 1981)). Carducci v. Regan, 714 F.2d 171 (D.C. Cir. 1983). This rule disposes of all plaintiff's non-constitutional and non-adverse action claims that might be raised with respect to the agency action. It is clear that no adverse action has been taken against plaintiff. See 5 U.S.C. § 7512.

In addition to the statutory claims, plaintiff has perfunctorily based some of his claims upon his reading of the fifth amendment. However, plaintiff's allegations on constitutional infirmity are no

more than occasional references to the fifth amendment without citation of legal authority and without argument. Under such circumstances, the course chosen by the Court in Carducci is appropriate:

> Of course not all legal arguments bearing upon the issue in question will always be identified by counsel, and we are not precluded from supplementing the contentions of counsel through our own deliberations and research. But where counsel has made no attempt to address the issue, we will not remedy the defect, especially where, as here, 'important questions of far-reaching significance' are involved. We therefore decline to entertain [plaintiff's] asserted but unanalyzed constitutional claim.

Carducci v. Regan, 714 F2d at 177 (citations omitted).

The Court therefore holds it is without jurisdiction to entertain the complaint and defendant's Motion to Dismissed is GRANTED.

/s/ Aubrey E. Robinson
Aubrey E. Robinson, Jr.
Chief Judge

Dated: May 29, 1985

[Filed July 13, 1984]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN J. WHITE,	:	
Plaintiff	:	
v.	:	CIVIL ACTION 80-0932
OFFICE OF PERSONNEL MANAGEMENT, et al.,	:	
Defendants	:	

MEMORANDUM OPINION

INTRODUCTION

In the complaint in this action, Plaintiff, Alan J. White, challenges on several statutory and constitutional grounds, Defendants' denial of an eligible rating for his potential appointment as an Administrative Law Judge (ALJ). Additionally, damages are sought under the Privacy Act, 5 U.S.C. § 552a, on the theory that his eligibility ratings were the result of Defendants' reliance upon records which did not meet the Privacy Act's standards of

"such accuracy, reliance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." 5 U.S.C. § 552a(e)(5).

On October 16, 1980, this Court dismissed Plaintiff's claim for injunctive relief finding that Plaintiff's claims for such relief were mooted by his receipt of an eligible rating in response to his 1980 application for an ALJ rating. The Court also dismissed Plaintiff's claim for damages under the Privacy Act arising out of the denial of his second application for the position of ALJ finding that the complaint was not timely filed. Plaintiff appealed the decisions of this Court.

The Circuit Court of Appeals affirmed this Court's ruling that Plaintiff's claims for injunctive relief were mooted by his receipt of an eligible rating in response to his 1980 application for an ALJ rating. The Court of Appeals, however, reversed

this Court's dismissal of the claim for damages and remanded the case for further proceedings on that claim.

On July 15, 1982 this court entered an Order limiting the scope of this action on remand. On January 27, 1983 the Court granted partial summary judgment for Defendants on Plaintiff's claims that the procedures used by Defendants to determine eligibility are subject to attack under the Act. This action is now before the Court solely for an adjudication of Plaintiff's claim for damages under the Privacy Act (Act). Remaining in this action is Plaintiff's challenge to the accuracy, relevance, timeliness and completeness of five evaluations or "vouchers" which Defendants received from third parties in the course of their evaluations of Plaintiff's qualifications to be an ALJ. Defendants have moved to dismiss the action or in the alternative for summary judgment

to which Plaintiff has filed an opposition. Upon consideration of the record herein and for the reasons hereinafter stated, Defendants' Motion for Summary Judgment is granted and the case is dismissed.

STATEMENT OF FACTS

Plaintiff became an employee of the Federal Power Commission (FPC) on July 11, 1971. He served as an Attorney, GS-14, in the Office of Special Assistants, drafting opinions for members of the FPC. On July 13, 1971, Plaintiff filed a report of securities holdings which required a listing of all natural gas companies and other firms having possible dealings with the FPC. In this report, Plaintiff failed to list his personal interest and his interest as trustee or co-trustee in certain shares of common stock of the Pittston Company (Pittston). Pittston, although principally a coal mining opera-

tion, had become a "natural gas company" within the meaning of the Natural Gas Act on October 2, 1970 when FPC issued to it a "small producer certificate" to enable it to sell natural gas in interstate commerce.

Three years later, on August 30, 1974, the Personnel Director of the FPC informed Plaintiff that ownership of Pittston stock was prohibited by FPC regulations which provided: "An employee. . .shall not own, directly or indirectly,. . .any securities of any. . .natural gas company subject to the jurisdiction of the Commission." 18 C.F.R. § 3.735-5(b)(5)(i) (1974). Plaintiff was requested to dispose of the prohibited securities within thirty (30) days. When Plaintiff failed to dispose of his prohibited securities, he was served with a notice on November 4, 1974 that he would be suspended without pay commencing December 5, 1974 and lasting until he rid himself of any interest in the securities

of Pittston. After granting a series of extensions of the suspension deadline, on March 15, 1975 the Executive Director of the FPC issued a final agency decision to suspend Plaintiff without pay, effective May 11, 1975 and continuing until "Mr. White has completely and finally divested himself of all right, title and interest in the Pittston stock." On May 6, 1975 Plaintiff advised the FPC that he had disposed of the Pittston securities. */

During the course of his dispute concerning the Pittston stock, on January 10, 1975 Plaintiff filed his first application with the Civil Service Commission (CSC), now Office of Personnel Management (OPM),

*/ Plaintiff's dispute with FPC over the Pittston stock issue is detailed in a "chronology" prepared by him and attached as Defendants' Exhibit 1 to Plaintiff's deposition of September 16, 1982 and filed herein. Plaintiff's deposition and this "chronology" vividly portray the background of the dispute giving rise to this present action.

Office of Administrative Law Judges (OALJ), to be rated for the position of Administrative Law Judge (ALJ). In connection with Plaintiff's application, OALJ mailed evaluation forms or "vouchers" to persons who had been identified as potentially knowledgeable concerning Plaintiff's qualifications to serve as an ALJ. Two of the completed vouchers (1975 vouchers) contained negative recommendations in response to the question:

> Based on your knowledge of the applicant's experience and demonstrated abilities, do you recommend him, without reservation, as having the judicial temperament and poise required for successful performance in a judicial or quasi-judicial position?

OALJ assigned to Plaintiff's application a score that was insufficient to meet the passing grade for further consideration for appointment to the register of persons eligible for selection as ALJs. They so advised Plaintiff in June of 1975.

Plaintiff filed a second application with

OALJ to obtain an ALJ rating in January 1976. Again, vouchers were mailed seeking comments concerning Plaintiff's qualifications. Three of these 1976 vouchers included negative responses to the identical question concerning "judicial temperament." One of these vouchers was returned by Webster Maxon, the former Executive Director of the FPC and the agency official who had issued the final agency order suspending Plaintiff until he disposed of his prohibited securities. Maxon, unlike the other respondents, had not requested confidentiality, thus, Plaintiff was provided with an unexpunged copy. Maxon stated the basis for his negative recommendation as follows:

> In 1973, Congressman John Moss. . . charged. . .that the [FPC] was guilty of a variety of conflict of interest. The Chairman of the Commission directed a thorough investigation. Although no conflicts of interest were found some 25 instances were uncovered in which employees held securities of companies which

> conducted operations affected by FPC regulations or were the parents of such companies. All of the employees involved were reported to the House Committee and ordered to dispose of their prohibited securities. All complied except Alan J. White. A proceeding was initiated under the Standard of Conduct Rules to suspend Mr. White without pay until such time as he brought himself into compliance. . . Mr. White was totally uncooperative and used extremely bad judgment in his handling of the matter. Because of the importance of the Administrative Law Judge in the federal administrative process, it is my view that applicants must be measured against a high standard of professionalism, competence and integrity. Mr. White's performance, both in his own behalf and on behalf of the agency in its regulatory proceedings, was definitely less than adequate. In my opinion he does not meet the qualifications for appointment to even a GS-15 position as Administrative Law Judge.

Again, OALJ informed Plaintiff that his applications did not meet the passing grade.

Plaintiff then sought access to all vouchers pursuant to Freedom of Information Act/Privacy Act (FOIA/PA) requests. OALJ provided complete copies of some of the

vouchers and redacted versions of the remainder. In 1980, Plaintiff filed an FOIA/PA suit in which he sought access to all portions of his OALJ application file, including the redacted vouchers to which he had been denied access. A final judgment exempting the withheld portions from disclosure was entered by this Court and affirmed on appeal.

On October 22, 1976, pursuant to the Privacy Act, Plaintiff requested OALJ to amend his record by deleting or expunging the 1975 and 1976 vouchers which contained the negative recommendations. Plaintiff filed a third application on March 20, 1980 with OALJ to obtain an ALJ rating and again requested "that White's entire past [1975-1976] application record be expunged (except for certain designated evaluations of him) as being out of date, or untimely with respect to the concurrently filed rating application. . ." When OALJ refused

to delete the vouchers from his record, Plaintiff filed this action.

Plaintiff contends that the Maxon voucher is inaccurate in "that it does not reflect Mr. Maxon's bona fide estimate of my ability. . .but reflects instead a designed attempt to make me look bad...[so] as to preclude my ever attaining a passing rating." **/ He also challenges the four redacted vouchers which contain negative recommendations, two of which [1975 vouchers] he contends are "untimely" because they were presumably used one year later in the 1976 evaluation of his second application.

DISCUSSION

The Privacy Act requires that each agency shall:

**/ Plaintiff attained a satisfactory rating after his third application in 1980 and was subsequently appointed an Administrative Law Judge.

1) Maintain in its records only such information as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or executive order of the President

and

5) Maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in determination.

5 U.S.C. § 552 (a)(e)(1) and (5). Under the Act, an agency is required to maintain its records in a manner to insure that the records provide useful, reliable information to fulfill the purpose for which the records are created and used. Zeller v. United States, 467 F. Supp. 487, 502 (E.D.N.Y. 1979). Importantly, the Act does not require agencies to serve as the ultimate arbiter of truth. Rather, the accuracy requirement is tempered by the realistic limitations of assuring only "such accuracy. . .as is reasonably

necessary to insure fairness." The key to the standard is reasonableness. Smiertka v. Department of Treasury, 447 F. Supp. 221, 225-26 (D.D.C. 1978), remanded, 604 F. 2d 698 (D.C. Cir. 1979).

In this action, OALJ was responsible for the certification of eligible applicants to the ALJ roster. In the certification process it sought and received evaluations from persons who knew the work experience, abilities and characteristics of the applicants. The determination that OALJ was to make, necessitated that some of the information solicited on the vouchers be in the nature of opinion or subjective judgment by the respondents. This is especially appropriate when considering an applicant's qualifications and potential as a judicial or quasi-judicial officer. Opinions concerning the "judicial temperament" of aspirants to judicial positions are routinely solicited and are an integral

part of the selection process.

Under the mandate of the Act that the records must be accurate, Courts have fashioned tests reviewing subjective judgments by scrutinizing the factual bases for the judgment and where the falsity of basic, objective facts has been clearly demonstrated, have ordered correction of records. Thus, in R.R. v. Department of the Army, 482 F. Supp. 770 (D.D.C. 1980), the Plaintiff had clearly disproved certain objective facts upon which a medical opinion had been rendered and the Court held that:

> An agency may not refuse a request to revise or expunge prior professional judgments once all the facts underlying such judgments have been thoroughly discredited. This position is reinforced in the Act's legislative history, where there are clear indications that insidious rumors and unreliable subjective opinions as well as simple factual misrepresentations fall within the ambit of the Act's strictures. Id. at 774 (emphasis added).

On the other hand, the Court acknowledged

that where subjective judgments are at issue and the factual predicate for such opinions are diverse, "it is next to impossible to reconstruct the process by which the opinion was formulated and determine what the opinion would have been," i.e., in the absence of the partly false predicate. "Under such circumstances, the challenged judgments are not so thoroughly discredited as to justify their deletions or contradiction in the record." Id at 775.

Applying this standard to the present case, the undisputed facts show that the basic facts underlying Maxon's recommendation were correct. Plaintiff did hold prohibited securities; he did fail to dispose of them within the time ordered; he did employ a wide variety of excuses and attempts to seek "reconsideration" under circumstances in which the prohibited nature of the securities and his supervi-

sors' intent to require their disposition were clear; and a suspension was issued pending White's compliance with the FPC's Standards of Conduct. Given these basic facts, Maxon's subjective evaluation of White's conduct as "uncooperative," "extremely bad judgment," and "less then adequate" must stand.

The very purpose of soliciting evaluations from third parties is to obtain their subjective views of an applicant. To demand that an agency or court must agree with the subjective evaluation for it to be sustained under the Privacy Act would effectively eliminate the usefulness of the voucher system, which is to obtain independent evaluations which OALJ (or a court) is incapable of rendering. Given the valid purpose for which these subjective opinions are sought, the vouchers are sufficiently accurate to insure fairness if the basic underlying facts upon which the opinion is

based are valid. In the present case, that standard is clearly met.

Plaintiff's challenge to the accuracy of the Maxon voucher is unavailing on this record. The reasons for the other unfavorable recommendations are unknown but assuming that they too resulted from the Pittston stock dispute, that dispute is an historical fact which cannot be changed. Whether or not Plaintiff violated FPC standards during the process which culminated in the ultimate divestiture of his Pittston stock was not a determination to be made by OALJ. Nor can this Court make that determination in this Privacy Act suit. The records sought to be expunged in this action are records of OALJ compiled as part of its normal responsibility. Plaintiff's opinion as to how Maxon should have reacted to the Pittston stock dispute is irrelevant. He has no statutory right under the Act to the reconstruction of a

record "according to his own whims or preferences [and] on occasion accuracy is achieved only by allowing a disputed question of fact or judgment previously recorded to remain in the record, qualified by subsequent data." R.R. v. Department of Army, 482 F. Supp. at 773.

Similarly, Plaintiff's challenge to the timeliness of the 1975 vouchers is utterly without merit considering the nature and purpose for which the voucher was furnished. Plaintiff bears the burden of proving that the challenged vouchers fail to meet the Act's standards, and that consequently a determination [was] made which [was] adverse to him. 5 U.S.C. § 552a(g) (1) (C). 5 U.S.C. § 552a(g) (4) (A) provides that damages are recoverable for actual damages sustained as a result of the agency's violation of the Act. In considering whether challenged records are sufficiently timely as is reasonably

necessary to assure fairness, the Court must again consider the nature and purpose of the challenged record. Zeller v. United States, 467 F. Supp. at 502.

OALJ's objective in sending out vouchers is not to obtain performance evaluations regarding the last twelve months. Rather, they are sent to a broad range of past and present supervisors, colleagues, clients, judges, and others who may have had significant contact with the applicant during the period of his professional development. Indeed, a minimum of seven years of qualifying experience is required simply to apply for an ALJ position.

While the recentness of a respondent's contact may be important in evaluating the significance of the information provided, e.g., comments on maturity, the vouchers assure that this significance will be appropriately measured. The very first question asks: "In what capacity, how

long, and how well have you known the applicant?" Similarly, item 12 asks: "What period(s) of time is (are) covered in your evaluation of the applicant's experience in the field of administrative law or in actual trial practice in federal courts?"

There was no substantive difference between the voucher inquiries in 1975 and 1976. Indeed, the identical form was used except that in 1976 an additional provision was added to allow a respondent to indicate his preference for confidentiality. The type of information requested is likewise enduring. Insofar as it may be dated, the potential for unwarranted reliance upon "stale" information is avoided by items 1 and 12a, quoted supra.

Oddly, Plaintiff himself has "vouched" for the use of evaluations that are far more than one year old. With his most recent application, filed March 20, 1980,

Mr. White specifically asked that OALJ utilize certain of the 1975 and 1976 vouchers in evaluating his third application. See Complaint at ¶39. It is obvious from the foregoing and a review of the form of the vouchers themselves, that use of the vouchers in issue meets the Privacy Act's requirements that they be sufficiently timely to assure fairness.

Finally, with respect to the redacted vouchers, Plaintiff requests that he be supplied with complete unredacted copies, repeatedly stating that he cannot prove the falsity of that which he cannot see. His point is well taken, however, this dispositive issue was raised, fully briefed, and decided by the Court in the context of Plaintiff's motion to compel discovery. See Order dated December 16, 1982. As Defendants pointed out in their opposition to compel production of the complete, unredacted vouchers, Congress carefully

balanced the access and amendment provisions vis-a-vis Exemption (k)5. Plaintiff's construction of the Act would eliminate the exemption wholesale. Since the Court has already ruled on this issue, the Court shall not belabor the matter further here.

An appropriate Order accompanies this Memorandum Opinion.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
Chief Judge

DATE: July 13, 1984

[Filed July 13, 1984]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN J. WHITE,	:	
Plaintiff	:	
v.	:	CIVIL ACTION 80-0932
OFFICE OF PERSONNEL MANAGEMENT, et al.,	:	
Defendants	:	

ORDER

In accordance with the Memorandum Opinion entered this date in the above-captioned action, it is by the Court this 13th day of July, 1984,

ORDERED, that Defendant's Motion for Summary Judgment be and hereby is GRANTED; and it is

FURTHER ORDERED, that the above-captioned action be and hereby is DISMISSED.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
Chief Judge

[Filed July 17, 1984]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN J. WHITE,

Plaintiff

v. : Civil Action 80-0932

OFFICE OF PERSONNEL MANAGEMENT, et al.,

Defendants

ORDER

It is by the Court this 16th day of July, 1984,

ORDERED, that the Memorandum Opinion filed in the above-captioned action on July 13, 1984 be and hereby is AMENDED at the footnote on page 8 as follows:

> "Plaintiff attained a satisfactory rating after his third application in 1980 and was subsequently placed on the list of those eligible for appointment to the position of Administrative Law Judge."

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
Chief Judge

Excerpts from Title 5 U.S.Code

5 U.S.C. § 1104. Delegation of authority for personnel management

(a) . . .

(1) the President may delegate, in whole or in part, authority for personnel management functions, including authority for competitive examinations, to the Director of the Office of Personnel Management; and

(2) the Director may delegate, in whole or in part, any function vested in or delegated to the Director, including authority for competitive examinations (except competitive examinations for administrative law judges appointed under section 3105 of this title), to the heads of agencies in the executive branch and other agencies employing persons in the competitive service....

5 U.S.C. § 1305. Administrative law judges

For the purpose of section 3105 . . . of this title . . . the Office of Personnel Management may . . . investigate, require reports by agencies, issue reports, including an annual report to Congress, prescribe regulations, appoint advisory committees as necessary, recommend legislation, subpena witnesses and records, and pay witness fees as established for the courts of the United States.

5 U.S.C. § 3105. Appointment of administrative law judges

Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.

5 U.S.C. § 3317. Competitive service; certification from registers

(a) The Office of Personnel Management shall certify enough names from the top of the appropriate register to permit a nominating or appointing authority who has requested a certificate of eligibles to consider at least three names for appointment to each vacancy in the competitive service.

5 U.S.C. § 3318. Competitive service; selection from certificates

(a) The nominating or appointing authority shall select for appointment to each vacancy from the highest three eligibles available for appointment on the certificate furnished under section 3317(a) of this title, unless objection to one or more of the individuals certified is made to, and sustained by, the Office of Personnel Management for proper and adequate reason under regulations prescribed by the Office.

PRIVACY ACT OF 1974

5 U.S.C. § 552a. Records maintained on individuals

* * *

(a) Definitions. - For purposes of this section -

* * *

(3) the term "maintain" includes maintain, collect, use, or disseminate.

* * *

(d) Access to records. - Each agency that maintains a system of records shall

* * *

(2) permit the individual to request amendment of a record pertaining to him and -

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either -

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the

procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sunday and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section. . . .

* * *

(e) Agency requirements. - Each agency that maintains a system of records shall -

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations abut an individual's rights, benefits, and privileges under Federal programs;

* * *

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination. . . .

* * *

(g)(1) Civil remedies. - Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with this request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and conse-

quently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on

the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

PART 297

PROTECTION OF PRIVACY IN PERSONNEL RECORDS

SUBPART A--RECORDS MAINTAINED ON INDIVIDUALS

297.111 Request for correction or amendment of record.

(a) Any individual may submit a request for correction of or amendment to a record that pertains to him or her to the Commission or an agency. The request should be made either in person or by mail to the System Manager or his designee indicated in the notice of systems of records.

(b) The processing of requests submitted by mail will be facilitated if the words "PRIVACY ACT REQUEST" appear in capital letters on the face of the envelope, and the letter of inquiry.

(c) Any request which is not addressed as specified in paragraph (a) of this section or which is not marked as specified in paragraph (b) of this section will be so addressed and marked by Commission or agency personnel and forwarded immediately to the responsible System Manager. A request not properly addressed by the individual will not be deemed to have been "received" for purposes of measuring time periods for response until the responsible System Manager receives it. In each instance when a request so forwarded is received, the System Manager or his designee shall notify the individual that his or her request was improperly addressed and the date when the request was received at the proper address.

(d) Since the request for correction or amendment normally will follow a request for access under section 297.108, the individual's identity will be established by his or her signature on the request.

(e) A request for correction or amendment should include the following:

(1) The specific identification of the record sought to be corrected or amended. (for example, description, title, date, paragraph, sentence, line, and words);

(2) The specific wording to be deleted, if any;

(3) The specific wording to be inserted or added, if any, and the exact place at which it is to be inserted or added; and

(4) A statement of the basis for the requested correction or amendment, with all available supporting documents and materials which substantiate the statement.

(f) The provisions of section 297.106 (d)(2) and (3) apply to the information obtained under paragraph (e) of this section.

297.112 Review of request for correction or amendment of record.

(a)(1) Not later than 10 days (excluding Saturdays, Sundays, and holidays) after receipt of a request to correct or amend a record, the System Manager or his designee shall send an acknowledgement providing an estimate of time within which action will be taken on the request. If a response cannot be made within 10 days due to

to unusual circumstances, the System Manager shall send an acknowledgement during that period providing information on the status of the request and asking for such further information as may be necessary to process the request. Unusual circumstances shall include circumstances where a search for and collection of requested records from storage, field facilities or other establishments are required, cases where a voluminous amount of data is involved, or instances where information on other individuals must be separated or deleted from the particular record. No acknowledgement will be sent if the request can be reviewed, processed, and the individual notified of the results of review (either compliance or denial) within the 10 days. Requests filed in writing will be acknowledged in writing at the time submitted.

(2) Promptly after acknowledging receipt of a request, or after receiving such information as might have been requested, or after arriving at a decision in 10 days, the System Manager or his designee shall either:

(i) Make the requested correction or amendment and advise the individual in writing of such action, providing either a copy of the corrected or amended record or a statement as to the means whereby the correction or amendment was effected in cases where a copy cannot be provided (for example, erasure of information from a record maintained only in an electronic data bank); or

(ii) Inform the individual in writing that his or her request is denied and provide the following information:

(A) The System Manager's or his designee's name and title or position;

(B) The date of the denial;

(C) The reasons for denial, including citation of the appropriate sections of the Act and this part; and

(D) The procedures for review of the denial as set forth in section 297.113, including the name and address of the Director, Bureau of Manpower Information Systems, or the Assistant Executive Director for Freedom of Information and Privacy, as appropriate. The term "promptly" in this paragraph means within 30 days (excluding Saturdays, Sundays, and holidays). If the System Manager or his designee cannot make the determination in 30 days, the individual will be advised in writing of the reasons therefor and of the estimated date by which the determination will be made.

(b) Whenever an individual's record is corrected or amended pursuant to a request by that individual, the System Manager or his designee shall notify all persons and agencies to which the corrected or amended portion of the record had been disclosed prior to its correction or amendment, if an accounting of such disclosure required by the Act was made. The notification shall require a recipient agency maintaining the record to acknowledge receipt of the notification, to correct or amend the record, and to apprise any agency or person to which it had disclosed the record of the substance of the correction or amendment. This requirement does not apply to disclosures made pursuant to paragraphs (a) or (b) of section 297.109 of this part.

(c) The following criteria are examples of those that will be considered by the System Manager or his designee in reviewing a request for correction or amendment:

(1) The sufficiency of the evidence submitted by the individual;

(2) The factual accuracy of the information;

(3) The relevance and necessity of the information in terms of the purpose for which it was collected;

(4) The timeliness and currency of the information in light of the purpose for which it was collected;

(5) The completeness of the information in terms of the purpose for which it was collected;

(6) The degree of possibility that denial of the request could unfairly result in determinations adverse to the individual;

(7) The character of the record sought to be corrected or amended; and

(8) The propriety and feasibility of complying with specific means of correction or amendment requested by the individual.

(d) The Commission or the agency will not make an effort to gather evidence for the individual, but does reserve the right to verify the evidence which the individual submits.

(e) Correction or amendment of a re-

cord requested by an individual will be denied upon a determination by the System Manger that:

(1) The information submitted by the individual is not accurate or relevant;

(2) The correction or amendment would violate an enacted statute or regulation; or

(3) The individual refuses to provide information which is necessary to process the request to correct or amend the record.

(f) If a request is partially granted and partially denied, the System Manager shall follow the appropriate procedures of this section as to the records within the grant and the records within the denial.

(g) When an agency detects erroneous data in an individual's personnel records or a third party source provides corrected information, it shall correct the record and provide all recipients of such record with the corrected information to the extent that it is relevant to the recipient's uses and deemed feasible to do so.

297.113 Review of initial adverse determination on correction or amendment.

(a) When a request for correction or amendment has been denied initially under section 297.112, the individual may submit a written appeal within 30 days after the date of the initial denial.

* * *

(c) The individual's request papers shall include the following:

a copy of the original request for correction or amendment; a copy of the initial denial; and a statement of the reasons why the initial denial is believed to be in error. The request shall be signed by the individual. The record that the individual requests be corrected or amended will be supplied by the System Manager who issued the initial denial. While the foregoing normally will comprise the entire record on request, the System Manager may seek additional information necessary to assure that the final determination is fair and equitable and, in such instances, the additional information will be disclosed to the individual to the greatest extent possible and an opportunity provided for comment thereon.

(d) The Director, Bureau of Manpower Information systems or the Assistant Executive Director for Freedom of Information and Privacy, as appropriate, shall act upon the request and issue a final determination in writing not later than 30 days (excluding Saturdays, Sundays, and holidays) from the date on which the appeal is received; provided that the Director, bureau of Manpower Information systems or the Assistant Executive Director for Freedom of Information and Privacy, as appropriate, may extend the 30 days upon deciding that a fair an equitable review cannot be made within that period, but only if the individual is advised in writing of the reason for the extension and the estimated date by which a final determination will be issued (estimated date should not be later than the 60th day excluding Saturdays, Sundays, and holidays after

receipt of appeal unless unusual circum stances, as described in section 297.112(a) (1) are met).

(e) If a request is determined in favor of the individual, the final determination shall include the specific corrections or amendments to be made. A copy thereof shall be transmitted promptly both to the individual and to the System Manager who issued the initial denial. Upon receipt of such final determination, the System Manager promptly shall take the actions set forth in section 297.112(b).

(f) If the request is denied, the final determination shall be transmitted promptly to the individual and state the reasons for the denial. The notice of final determination also shall inform the individual of the following information:

(1) The right of the individual to file a concise statement of reasons for disagreeing with the final determination. Such a statement shall be filed with the Director, Bureau of Manpower Information Systems, U.S. Civil Service Commission, 1900 E Street, N.W., Washington, D.C. 20415, or with the Assistant Executive Director for Freedom of Information and Privacy, U.S. Civil Service Commission, 1900 E Street, N.W., Washington, D.C. 10415, as appropriate. It should identify the date of the final determination and be signed by the individual. The Director, Bureau of Man power Information Systems or the Assistant Executive Director for Freedom of Information and Privacy, as appropriate, shall acknowledge receipt of such statement and inform the individual of the date it was received;

(2) The fact that any such disagreement statement filed by the individual will be noted in the disputed record and that a copy of the statement will be provided to persons and agencies to which the record is disclosed subsequent to the date of receipt of such statement;

(3) The fact that the Commission will append to any such disagreement statement filed by the individual, a copy of the final determination or summary thereof which also will be provided to persons and agencies to which the disagreement statement is disclosed; and

(4) The right of the individual to judicial review of the final determination under 5 U.S.C. 552a(g)(1)(A), as limited by 5 U.S.C. 552a(g)(5).

(g) In making the final determination, the Director, Bureau of Manpower Information Systems or the Assistant Executive Director for Freedom of Information and Privacy, as appropriate, shall use the criteria set forth in section 297.112(c) of this subpart and shall deny an appeal only on the grounds set forth in 297.112(e).

(h) If an appeal is partially granted and partially denied, the Director, Bureaus of Manpower Information systems or the Assistant Executive Director for Freedom of Information and Privacy, as appropriate, shall follow the appropriate procedures of this section as to the records within the grant and the records within the denial.

(i) Although a copy of the final determination or a summary thereof will be treated as part of the individual's record for purposes of disclosure in instances where

the individual has filed a disagreement statement, it will not be subject to correction or amendment by the individual.

(j) The provisions of section 297.106(d)(2) and (3) apply to the information obtained under paragraphs (c) and (g)(1) of this section.

UNITED STATES CIVIL SERVICE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20415

December 2, 1976

Alan J. White, Esq.
8201 Snug Hill Lane
Potomac, Maryland 20854

Dear Mr. White:

This has reference to your letter of August 16, 1976, to the Appeals Review Board concerning a review of the rating assigned to the application you filed under Announcement 318. Your letter was forwarded to this office in line with current procedures which provide for reconsideration of initial examination ratings. The record that has been reviewed includes the materials you submitted in support of your application, the information developed by the Commission and your letters, including your communication of October 22, 1976.

In evaluating your application for eligibility it was found that you had met the requirements of the Announcement having shown that you had acquired the necessary length, type and level of qualifying experience. The level of your experience as an attorney-adviser in the Federal Power Commission, as described in your application, was assigned 55 (out of a possible 60) and 50 points towards eligibility at the GS-15 and GS-16 grade levels, respectively.

In line with the examining and rating procedure followed in this program, information was then elicited from individuals having knowledge of your experience

and professional qualifications; and an additional 18 points were added to the ratings mentioned above based upon a review of their evaluations of the factors listed on page 4 of the Announcement.

Although your letter does not discuss the evaluation and rating of your experience, reconsideration shows that the numerical assignment made to your experience was in conformity with the standard adopted for this program and was correct.

In regard to the evaluations submitted to the Commission, your letter of October 22 discusses in detail the Form 192 [evaluation] submitted by the former Executive Director of the Federal Power Commission. You request that it be deleted along with certain other vouchers [evaluations] "presumably dated June 1, 1976" and "April 11, 1975".

In connection with the second part of the examining process, the evaluation and rating of professional qualifications of applicants, the Commission seeks to develope [sic.] sufficient information on the factors enumerated in the Announcement in order to assign a fair and reasonable score to an application. Accordingly, evaluations are secured from a number of individuals having personal knowledge of the applicant's experience and qualifications. Evaluations are elicited from agency officials, supervisory personnel, Administrative Law Judges, agency associates and other attorneys. In evaluating the responses in order to arrive at a proper numerical rating or score, consideration is given to the position of the respondent and the nature of the contacts had with the applicant, the frequency of

the association, its recency, etc. Greater or lesser weight may be assigned to particular responses in light of the foregoing factors.

Concerning the three requests in your October 22 letter, this office is unaware of any basis for deleting or expunging particular evaluations from an official record. However, as indicated above, the weight or consideration accorded a specific response may vary. And, in the light of an association which was limited in time, somewhat distant and infrequent and in consideration of the comments contained in an [sic., and] annexed to your October 22 letter, this office has discounted to a great extent the comments and has assigned minimal weight to the checkmarks contained in the Form 192 dated June 1, 1976, which you challenge.

Nevertheless, based on a careful review of all of the remaining forms 192 in the record, it is the opinion of this office that the scoring of your qualifications and the final assigned rating were reasonable and proper. Accordingly, a change in the determination in the letter of August 13, 1976, cannot be made.

An appeal from this determination may be made by letter directed to the Chairman of the Appeals Review Board. In order to be timely the appeal should be filed no later than 30 days after your receipt of this letter.

Sincerely yours,

/s/ Charles J. Dullea
Charles J. Dullea
Director